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JUN 13 1958
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No. 1012

In the Supreme Court of the United States

OCTOBER TERM, 1957

FRED WASHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (R. 106-111; Pet. App. 1-7) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1958 (R. 112). The petition for a writ of certiorari was filed on May 16, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction.

2. Whether alleged illegality of an arrest would warrant reversal of the conviction where no evidence was obtained at the time of arrest.

STATEMENT

Petitioner and his brother, Leon Washington, were charged in a two-count indictment returned in the United States District Court for the Northern District of Illinois with (1) the unlawful purchase of 486 grains of heroin not in the original stamped package, in violation of 26 U.S.C. 4704(a); and (2) the unlawful concealment of this heroin, knowing that it had been imported into the United States contrary to law, in violation of 21 U.S.C. 174 (R. 3-4). In a trial before the court without a jury (R. 4-5), petitioner was found guilty on both counts and sentenced generally to imprisonment for two years and a fine of $1.00 (R. 98-100).[1] On appeal the conviction was affirmed (R. 100-101, 112).

The pertinent evidence adduced at the trial may be summarized as follows:

On June 17, 1956, four federal narcotics agents were in the apartment of Mrs. Ardie Kernick at 4615½ South Drexel Boulevard in Chicago (R. 13, 39, 59, 77). Agent Heisig suggested that Mrs. Kernick should telephone petitioner at his nearby apartment at 4627 South Drexel, where the unlisted number (KE 6-6460) was in the name of petitioner's wife (R. 23-24, 35-37).[2] After Mrs. Kernick dialed this number at 7:25 p.m.

[1] Leon Washington was also found guilty and is now serving his sentence (R. 98; Pet. App. 1).

[2] Agent Emerick knew about petitioner through "anonymous phone calls, and from other people whom we had arrested for narcotic violations" (R. 57).

and began speaking, one of the agents put his hand over the telephone and asked her if this was Fred Washington (petitioner) talking. Mrs. Kernick replied that it was (R. 18, 24, 71, 54). After dialing, Mrs. Kernick had tilted the receiver. Agents Heisig and Mattera both had an ear next to the telephone and heard the conversation between Mrs. Kernick and petitioner (R. 14, 16, 70, 77-78). According to the government's evidence this conversation was as follows (R. 17, 76):

> Mrs. Kernick: Hello. Is Fred there?
> Petitioner: Yes, this is Fred. Who is this?
> Mrs. Kernick: This is Dee, Baby.
> Petitioner: Yes.
> Mrs. Kernick: I would like to get a couple; can you get me some?
> Petitioner: I can get you a couple.
> Mrs. Kernick: How long will it take?
> Petitioner: About an hour or so.
> Mrs. Kernick: Okay.

Agents Heisig and Mattera did not know petitioner's voice at this time, but did recognize it the next day at 10:30 a.m., when petitioner was interviewed at police headquarters. The agents testified that it was the same voice they had heard in the telephone conversation the previous evening (R. 24, 63-64, 76).

Upon hearing Mrs. Kernick state that the other party to the telephone call was the petitioner, agent Heisig told agents Love and Emerick to arrest petitioner. These agents left to begin surveillance of petitioner's apartment at 4627 South Drexel (R. 25, 40, 59, 66, 71). About 10 or 15 minutes later they saw petitioner and Leon Washington leave the apartment house

and drive away in petitioner's Cadillac (R. 40, 55, 59-60, 65-66). Petitioner and Leon Washington then picked up a third man, and returned to the vicinity of petitioner's apartment (R. 60, 66-67). The agents observed Leon Washington leave the Cadillac and drive away in a green Pontiac. In the meantime the Cadillac left (R. 41, 61).

About ten minutes later and one hour after the telephone call, Leon Washington appeared at Mrs. Kernick's apartment with two packages of heroin hydrochloride. He was arrested by agent Heisig (R. 18-20, 9-12, 90). Shortly thereafter Heisig saw agents Emerick and Love near the apartment and informed them of Leon Washington's arrest. They then drove around and found petitioner parking his Cadillac on 31st Street near Indiana (R. 21, 41-42, 61-62, 69). The agents arrested petitioner without a warrant at about 9:00 p.m. (R. 42, 45, 56, 62, 72).

There was a conflict between the testimony of government witnesses and witnesses for the defense. Petitioner denied that he had received the telephone call on June 17, 1956 from Mrs. Kernick (R. 91). Leon Washington testified that he was the person who had this telephone conversation, after which he purchased the heroin and brought it to Mrs. Kernick's apartment, with the hope that he, an addict, would be given a "fix" (R. 94-96). Mrs. Kernick, under indictment at the time of the trial, testified as a witness called by the court. She admitted that she had a telephone conversation substantially similar to that shown by the government evidence, but that the person on the other end of the line was not the petitioner, with whose telephone voice she was familiar (R. 80 81, 82, 89). She stated

that, when she was dialing, agent Heisig put his ear to the telephone, but that the other agent did not do so (R. 89).

ARGUMENT

Petitioner contends that the trial judge should not have credited the government evidence as to petitioner's telephone conversation with Mrs. Kernick, and that therefore the evidence was insufficient to support his conviction. It is, however, not inherently incredible that the two agents should be able to hear the telephone conversation by standing close to the tilted receiver.[3] It is a matter of common knowledge that, when a telephone receiver is so held, it is often possible for a bystander several feet away to hear the words spoken from the other end of the line. Only a short time elapsed from the overhearing of the telephone voice by the agents in the evening, and their direct audition of petitioner's voice the next morning. Cf. *Fabacher* v. *United States*, 84 F. 2d 602, 604 (C.A. 5). It is also significant that Mrs. Kernick, who was familiar with petitioner's voice, informed the agents at the time of the conversation that the voice on the other end of the line was the petitioner's. And since petitioner's voice was properly identified as the party called, testimony as to the conversation was admissible. Cf. *Rathbun* v. *United States*, 355 U.S. 107; *United States* v. *White*, 228 F. 2d 832, 834-835 (C.A. 7); *United States* v. *Carr*, 219 F. 2d 876, 878-879 (C.A. 7); *Morton* v. *United States*, 60 F. 2d 696, 698 (C.A. 7), certiorari denied, 288 U.S. 607.

[3] Even if the court believed that only agent Heisig (and not Mattera) heard the conversation, that would have been sufficient.

The court was not obliged to credit petitioner's witnesses or Mrs. Kernick. Petitioner's interest and motive for denial of the conversation was obvious. The case against Leon Washington did not depend on the telephone conversation. Consequently, Leon may well have thought he had nothing to lose by taking the blame for his brother. Mrs. Kernick's testimony was of doubtful credibility, since on the day after the telephone conversation she made a written statement to the police acknowledging that her conversation had been with petitioner, and later recanted this statement at the trial (R. 83-84).

Both courts below having found the evidence sufficient to support conviction, there is no occasion for further review of the evidence by this Court. See *Kann* v. *United States*, 323 U.S. 88, 93; *United States* v. *Johnson*, 319 U.S. 503, 518; *Delaney* v. *United States*, 263 U.S. 586, 589-590.

2. There is no merit to petitioner's contention that his conviction should be reversed on the ground that his arrest was illegal as having been made without probable cause (Pet. 11-16).

Prior to the time of petitioner's arrest the agents had probable cause, arising from the facts and circumstances within their knowledge, to warrant reasonable belief that petitioner had committed a felony. Cf. *Brinegar* v. *United States*, 338 U. S. 160, 175-176. At the time of the telephone conversation ordering delivery of the heroin, Mrs. Kernick announced that she was talking to petitioner. Shortly thereafter petitioner left his apartment with his brother and the brother came to deliver narcotics to Mrs. Kernick. It was only after obtaining information as to delivery

that the agents found petitioner and arrested him. By that time, there was probable cause for believing that petitioner had been a participant in the sale and therefore subject to arrest on probable cause to believe he had committed a felony.

Moreover, there is no contention that the allegedly illegal arrest operated in some way (*e.g.*, by use of a coerced confession or evidence seized incidental to petitioner's arrest) to deprive petitioner of a fair and impartial trial. Even if it be assumed *arguendo* that the arrest was illegal, this is beside the point since the arrest did not in any manner bring about, or taint, the conviction. Cf. *Frisbie* v. *Collins*, 342 U.S. 519, 522; *Ker* v. *Illinois*, 119 U.S. 436.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1958.

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